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Supreme Court of the United States

OCTOBER TERM, 1956

No. 573

LaVERL JOHNSON and JOLEEN JOHNSON,
husband and wife, and
PACIFIC FRUIT EXPRESS COMPANY,
Petitioners,

vs.

UNION PACIFIC RAILROAD COMPANY,
a corporation,
Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI

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INDEX

Subject Index

Page

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 11

ARGUMENT 18

Point 1
Railroad not selling Electrical Energy 18

Point 2
Power delivered to Express Company at Railroad Line 20

Point 3
Railroad as Lessor not liable 22

Point 4
Railroad not negligent 22

Point 5
Conduct of Express Company not foreseeable 26

Point 6
Operation of Substation Proximate Cause 29

Point 7
Transmission of energy only a condition 30

Point 8
Discussion of the Petition in general 31

Independent Contractor 37

Trial Court vs. Court of Appeals 39

Point 9
Evidence wholly insufficient to support verdict for petitioners 39

No adequate reason for granting Writ of Certiorari 40

CONCLUSION 42

APPENDIX 43-44

TABLE OF CASES CITED

Antler vs. Cox,
27 Ida. 517, 149 Pac. 731 ..... 27, 29, 31, 36

Atchison T. & S. F. Ry. Co., vs. Calhoun,
213 U. S. 1, 53 L. Ed. 671 ..... 28, 29

Austin vs. Riverside Portland Cement Company,
(DCA Cal.) 271 Pac. (2d) 943, 948 34

Benard vs. Vorlander
(Cal. DCA) 197 Pac. (2d) 42, 45 24

Bogoratt vs. Pratt & Whitney Aircraft Co.,
(Conn.) 157 A. 860 ..... 25, 26

Brady vs. Southern R. Co.,
320 U. S. 476, 88 L. Ed, 239 ..... 40, 41

Brown vs. Arrington Const. Co.,
74 Ida. 338, 262 Pac. (2d) 789 38

Burns vs. Carolina Power & Light Co.,
(4 Cir.) 193 Fed. (2d) 525 25

Charnock vs. Texas & P. R. Co.,
194 U.S. 432, 48 L. Ed. 1057 28

Chatterton vs. Pocatello Post,
70 Ida. 480, 223 Pac. (2d) 389, 20 A. L. R.
(2d) 783 ..... 23, 29, 30, 36, 41

City of Cushing vs. Presbury,
(Okla. 1941) 109 Pac. (2d) 1077 24

City of Lewiston vs. Isaman,
19 Ida. 653, 115 Pac. 494 22

Clark vs. Chrisop,
72 Ida. 340, 241 Pac. (2d) 171 29

Cole vs. German Sav. & L. Society,
124 Fed. 113, 63 L. R. A. 416 ..... 28, 29, 31

Eckenrode vs. Pennsylvania R. Co.,
335 U. S. 329, 93 L. Ed. 41 41

Ex Parte Woods,
143 U. S. 202, 36 L. Ed. 125 41

Fisk vs. Bonner Tie Company,
40 Ida. 304, 232 Pac. 569 38

Garrison vs. St. Louis & S. F. Ry. Co.,
(Kan.) 271 Pac. (2d) 307, 311 28

Georgia Power Company vs. Kinard,
(Ga.) 170 S. E. 688, 691 30

Gifford vs. Nottingham,
68 Ida. 330, 193 Pac. (2d) 831 38

Goar vs. Village of Stephen,
(Minn.) 196 N. W. 171 25

Goodman vs. Harris,
(Cal.) 253 Pac. (2d) 447 22

Hair vs. City of Lynchburg
(Va.) 181 S. E. 285, 287 ..... 28, 30

Harter vs. Colfax Electric Light & Power Co.,
(Iowa) 100 N. W. 508 30

Hauser vs. Pacific Gas & Electric Co.,
(Cal. App.) 23 Pac. (2d) 1068 31

Hawley vs. Alaska Steamship Company,
(9 Cir.) 236 Fed. (2d) 307 40

Hiebert vs. Howell,
59 Ida. 591, 85 Pac. (2d) 699 38

Hill vs. Pacific Gas & Elec. Co.,
(Cal.) 136 Pac. 492 24

Hoffer vs. City of Lewiston,
59 Ida. 538, 85 Pac. (2d) 238 39

Hoffman vs. Leavenworth Light, H. & P. Co.,
(Kan.) 138 Pac. 632, 50 LRA (NS) 574 24

Howard vs. Reinhart & Donovan Co.,
(Okla.) 166 Pac. (2d) 101 25

Irelan-Yuba Gold Quartz M. Co., vs. Pacific Gas & Elec. Co.,
(DCA Cal.) 105 Pac. (2d) 616 24

Johnson vs. Union Furniture Company,
(Cal. DCA) 87 Pac. (2d) 917 30

Kelly vs. Duke Power Company
(4 Cir.) 97 Fed. (2d) 529 23

Leavitt vs. Stamp
(Ore.) 293 Pac. 414 ..... 30, 31

Leo vs. Dunham
(Cal.) 264 Pac. (2d) 1, 3 28

Memphis Consol. Gas & Elec. Co., vs. Speers,
(Tenn.) 81 S. W. 595 24

Minneapolis General Electric Co., vs. Cronon,
166 Fed. 651, 20 LRA (NS) 816 24

Modlin vs. Twin Falls Canal Co.,
49 Ida. 199, 286 Pac. 612 38

Moore vs. Chesapeake & O. Ry. Co.,
184 Fed. (2d) 176, 179, 340 U. S. 573,
95 L. Ed. 547 ..... 40, 41

Mullican vs. Meridian Light & R. Co.,
(Miss.) 83 So. 816, 9 A.L.R. 165 24

National Labor Relations Board vs. Pittsburgh Steamship Company, 340 U.S. 498, 503, 95 L. Ed. 479, 483 41

Northern R. Co. vs. Page,
274 U.S. 65 23

Olin vs. Honstead,
60 Ida. 211, 91 Pac. (2d) 380, 383, 384 22

Pressley vs. Bloomington-Normal Ry. & Light Co.,
(Ill.) 111 N.E. 511 24

Palsgraf vs. Long Island R. Co.,
248 N.Y. 330, 162 N.E. 99, 59 A.L.R. 1253 ..... 23, 28

Pennsylvania R. Co. vs. Chamberlain,
288 U.S. 333, 77 L. Ed. 819 40

Perry vs. Ohio Valley Elec. R. Co.,
(W. Va.) 74 S.E. 993 ..... 24, 37

Pittsburgh SS Company vs. Palo
(6 Cir.) 64 Fed. (2d) 198, 200, 201 29

Probart vs. Idaho Power Company,
74 Ida. 119, 258 Pac. (2d) 361 ..... 27, 37, 41

Richards vs. Stanley,
(Cal.) 271 Pac. (2d) 23, 27 28

Rice vs. Sioux City Cemetery,
349 U.S. 70, 99 L. Ed. 897 41

Roberts vs. Pac. Gas & El. Co.,
(Cal. DCA) 283 Pac. 353 24

Rowe vs. Northern Pacific Ry.,
52 Ida. 649, 17 Pac. (2d) 352 31

Seith vs. Commonwealth Electric Company,
(Ill.) 89 N.E. 425 31

Splinter vs. City of Nampa,
74 Ida. 1, 256 Pac. (2d) 215 ..... 29, 30, 36

Stackpole vs. Pacific Gas & Electric Co.,
(Cal.) 186 Pac. 354 30

The President Madison,
(9 Cir.) 91 Fed. (2d) 835, 841 28

United States vs. Rothschild International Steve. Co.,
(9th Cir.) 183 Fed. (2d) 181 29

Woodruff vs. Bowen,
(Ind.) 34 N.E. 1113 30

STATUTES AND RULES CITED

Page

Idaho Code, Section 54-1001, National Electric Code 32

Idaho Code, Section 72-811 ..... 38, 43

Idaho Code, Section 72-1010 ..... 38, 43-44

TEXTS CITED

134 A.L.R., 508, 511, 517, 518, 526 23

14 Corpus Juris, p. 58, Sec. 19 38

14 Corpus Juris, p. 873, Sec. 1332 38

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BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The Statement of Facts set forth in the petition establish no duty on the part of the Railroad to the petitioner LaVerl Johnson, and establish no issue of negligence. However, in order that this court may have a complete picture of the evidence on which the Court of Appeals correctly based its opinion we set forth some additional facts.

Prior to March 1, 1924 the Pacific Fruit Express Company was receiving power direct from the Idaho Power Company. On March 1, 1924 the Oregon Short Line Railroad Company (not a party to this action) entered into a contract with the Pacific Fruit Express Company (Deft's Ex.

No. 26, R 314-315), which recites that the Idaho Power Company had agreed to furnish power to the Oregon Short Line Railroad Company at a different rate than that provided to the Pacific Fruit Express Company. The Court of Appeals gives the substance of this arrangement on page 429 of its opinion, 233 Fed. (2d), to the effect that the Railroad would buy all of the electricity and would then bill the Pacific Fruit Express Company for the proportion of the electrical energy used. The contract then provided for the building of a substation by the Oregon Short Line Railroad Company to be paid by the Pacific Fruit Express Company (R 315), and the Pacific Fruit Express agreed to pay the Oregon Short Line Railroad Company for power received plus 10% for transmission line and transformer losses (R 316). In other words, this was merely permitting the Pacific Fruit Express to take electrical energy supplied by the Idaho Power Company off the Oregon Short Line Railroad line. The Railroad was not actually delivering energy but had merely permitted the Express Company to hook a transmission line onto the Railroad line; the Railroad was not generating power (R 161, 354).

The Pacific Fruit Express Company transmission line from the Railroad line across the tracks and the substation was built by the Oregon Short Line Railroad Company, the cost of which was first estimated by the Express Company (Deft's Ex. 30, R 250), and about June 11, 1926 the actual cost was determined (Deft's Ex. 31, R 251), and the Oregon Short Line Railroad Company was paid by the Pacific Fruit Express Company for the construction of the trans-

mission line and the substation (R 252), following which the Express Company made out a completion report (Deft's Ex. 32, R 252), all of which exhibits definitely state that the ownership of the transmission line and the substation was in the Pacific Fruit Express Company.

The line and the station are carried in the capital or investment accounts of the Pacific Fruit Express Company, which shows ownership in that company (R 266); they are not carried in the capital or investment accounts of either the Oregon Short Line Railroad Company or the Union Pacific Railroad Company. This is so because the Express Company paid for them and it is the owner (R 273-274).

When the substation and transmission line were completed Mr. Branum of the Express Company accepted them for the Express Company (R 277), and Pacific Fruit Express Company ownership thereof was by the lessor Oregon Short Line Railroad Company acknowledged (Deft's Ex. 28, R 332); the Pacific Fruit Express Company is also the operator of the substation (Deft's Ex. 32, R 264, 294, 296).

Defendant's Exhibit No. 27 (R 322) is a lease from the Oregon Short Line Railroad Company to the Pacific Fruit Express Company dated April 29, 1926, and provides for the transformer and transmission line site; the transformer site and transmission line are shown in yellow on Ex. B attached to Exhibit 27, and are also shown on Ex. B attached to Exhibit No. 28 (R 326-333). Defendant's Exhibit No. 29 (R 336-338) merely enlarges the transformer

site from 15 x 22 to 33 x 31 feet, and continued the rental for the right to maintain and operate the transmission line across the tracks of the railroad to the substation.

The line across the tracks from the railroad line, described in the record as the Batiste line, to the substation only serves the substation and does not serve any railroad facilities (R 166, 282, 341, 345). There are disconnect switches on the pole of the Batiste line where the line to the Express Company substation takes off (R 283), and this is the point the power is delivered to the Express Company (R 342). At the top of the substation there is a pole top switch which deenergizes the three transformers in the substation (R 162, 163, 174, 302). In addition thereto there are switches at the substation to disconnect the power going to the lightning arrestors (R 163, 182, 203, 208-209, 239, 286, 345).

The substation is enclosed with a high wire fence (R 123, 166) covering an area of about 30 feet square (R 123-124, 284).

The substation is kept locked (R 167, 169, 284). There is only one gate in the transformer cage and that is in the west side. There are three transformers just inside the gate. The lightning arrestors are to the east of the transformers about 15 feet (R 141, 167-168).

The substation was standard when built and was what is termed a package substation, either of Westinghouse or

General Electric (R 236, 346). It was the latest thing in substations at the time it was built (R 236). This station on November 4, 1950, the date of the accident, and the equipment in it, was capable of receiving safely the electrical energy being supplied to it and to operate as a substation should. It was as safe as the day it was built. There was nothing defective about it or any of the equipment in it, but on the day in question it was not operated safely by the Express Company (R 182-183, 203-205, 236-237, 344-345). The witness Gilbert, District Foreman for the Idaho Power Company, accordingly testified that there was no reason to cut off service to the substation and that he would not have advised his employer, the Idaho Power Company, to refuse to furnish energy to the substation (R 238). The standards now are the same and if the station had been operated properly, the disconnect switches pulled, it would have been perfectly safe (R 239-241). It always operated satisfactorily as a substation; there were no injuries at it prior to November 4, 1950 (R 283).

LaVerl Johnson worked at the Pacific Fruit Express Company as a repairman (R 107); his immediate superiors were Shupe and H. O. Johnson. Shupe was plant manager and H. O. Johnson was Assistant Plant manager, both of whom worked for the Pacific Fruit Express Company and not for the Railroad; all were paid by the Pacific Fruit Express Company (R 224). H. O. Johnson died prior to the trial (R 123, 140).

Johnson went to work at the Express Company ice plant

at about 8 o'clock A. M. the morning of November 4, 1950. He was instructed by H. O. Johnson to paint electric cables that go into the transformer which was in a small transformer cage in the Ice Plant, and after that, or about noon, H. O. Johnson gave him the keys to the large transformer cage and instructed him to go into this cage and paint in there as he had painted in the other one (R 108, 110). There were only two keys to the substation gate and Mr. Shupe and his Assistant had possession of both; the Railroad had none (R 169, 293). McClellan saw LaVerl Johnson painting taped up wires running in and out of the transformers that morning in the small cage (R 140-141). LaVerl testified that when H. O. Johnson gave him the key to the large transformer there was no one else around (R 231).

After lunch, and after mixing the paint, LaVerl Johnson testified that he proceeded to the large transformer cage, unlocked the gate, walked around the transformer to work from the back side to the front and took hold of a wire that had not been deenergized (R 110), and this is when he received his injuries. His foot prints showed that after entering the gate he turned to the left, went around the north transformer, then switched back to the east to the lightning arrestors and then south to the south arrestor (R 141-142, 167-168). He testified that the transformers were right in front of the gate and was told to paint in this transformer cage like he had painted in the small one (R 228). In other words, he passed up the transformers where he was supposed to paint the leads and went back to the lightning arrestors, where he was injured.

He testified that he took no orders from the Railroad; that the Railroad did not tell him to paint the cables; that he took all orders from his supervisors at the Express Company, and that he went into the substation alone (R 231-232).

At about 9 A. M. November 4, 1950, Mr. James E. Johnson, Howard Johnson and Melvin Judge, all Pacific Fruit Express men (Judge was the Express Company electrician) went into the substation for the purpose of checking the oil in the transformers, and contrary to some inferences raised by petitioners witnesses, there were no Railroad electricians and no one from the Railroad at or around the substation (R 303-304, 308-309); there were some Pacific Fruit Express laborers that went in with them to cut weeds (R 303, 309), but the Johnsons and Judge were the last ones out and the gate was locked (R 304, 309). The laborers were warned that the arrestors were not deenergized and none of them got hurt (R 310, 313). Judge and the two Johnsons knew the arrestors were not deenergized (R 310). It was while these men were in the substation that morning that James E. Johnson pulled the pole top switch which disconnected the power to the transformer, but did not pull the disconnect switches to the arrestors.

There is no dispute about the fact that there were disconnect switches to deenergize the arrestors that could have been pulled by anyone working at the Pacific Fruit Express and particularly by the three men just referred to, one of whom was an electrician, and there was a hot stick available

to do this (R 286). If these disconnect switches had been pulled Johnson, of course, would not have been injured (R 170, 182-183, 203, 239, 286), and if this had been done the substation would have been perfectly safe (R 182, 237, 238). It was the method of operation of the substation by the Express Company that made the substation unsafe for LaVerl Johnson, and if the disconnect switches above the arrestors had been pulled there would have been no danger in the substation (R 183, 203, 209, 237, 239, 246).

The Pacific Fruit Express Company operates entirely independent of the Union Pacific; they are separate corporations, (R 235). The Pacific Fruit Express Company is a car line operator, and furnishes cars, refrigerator and heater service to various railroads, including the Union Pacific Railroad Company (R 359-361). The Pacific Fruit Express Company officers at Pocatello report to the Pacific Fruit Express officers in San Francisco, none of whom work for the Railroad, and no reports are made by the Pacific Fruit Express officers or employees to the Railroad (R 294-295, 360-361). The Pacific Fruit Express Company operates the substation (R 294), and no one from the Railroad has ever operated it, and no one from the Railroad has ever pulled the disconnect switches; Shupe and his Assistant has authority to pull them (R 295). Shupe did testify at the time of the accident he thought the pole-top switch deenergized all power in the substation, but he had been Plant Manager at the Plant only since September 1, 1949, (R 292); however, Mr. Branum, Superintendent, had been here in Pocatello and around the substation from the time it was first con-

structed: he knew about the switches (R 286); so did James E. Johnson, who pulled the pole-top switch the morning of the accident but did not pull the disconnect switches to the arrestors (R 304), and neither did Judge, who was the Express Company electrician (R 308, 310). Both of them knew what work was to be done (R 303, 308); even they did not anticipate apparently that later LaVerl Johnson was to be sent into this cage alone or that he would endeavor to paint a bare wire on the lightning arrestor after having been instructed to paint taped up leads to and from the transformers. There were no Union Pacific electricians at the substation since Shupe has been plant manager there (September, 1949) (R 292-293), and it is the Pacific Fruit Express Company men who change the transformer oil when it is needed (R 293-294, 346).

The Union Pacific electricians have no duties to perform in the substation (R 350) and no one from the Pacific Fruit Express, or otherwise, notified the Railroad electricians or anyone else on Saturday that Johnson was to go into the substation, and the lead electrician knew nothing of the accident until sometime the next day (R 343-344). The Union Pacific electricians work for the Union Pacific and not for the Express Company (R 341, 346); the only time they do work for the Express Company is when they are called by the Express Company to do so; they did some work in 1948 and 1949, which is shown on Defendant's Exhibit 33 (R 257-259), for which the Express Company paid the Railroad. The Union Pacific electricians have no keys to the substation and as a matter of fact did not work on Saturday.

November 4, 1950 (R 343).

The Idaho Power Company has also done work for the Express Company, as has the Strand Electric Company. The Express Company is not required to call the Union Pacific electricians (R 358-359), and the Express Company does lots of its own work (R 358). As a matter of fact the meter inside the substation was originally hooked up by the Idaho Power Company (R 284). The meter reader has to have someone from the Express Company, either Shupe or Johnson, let him in to read the meter, he has no key; Shupe had them both (R 114-115, 169, 293).

SUMMARY OF ARGUMENT

Point 1.

Petitioner's Cause of Action is that Railroad was Negligent (1) "in the furnishing of electrical energy" and (2) "in the operation of an electrical substation."

The Pacific Fruit Express Company was operating the substation—not the Railroad.

The Railroad was not selling electrical energy to the Pacific Fruit Express Company. Both companies were only co-users of energy supplied by the Idaho Power Company under an arrangement whereby the Express Company instead of purchasing power direct from the Idaho Power Company as it was doing prior to March 1, 1924, arranged to combine its load with that of the Oregon Short Line Railroad Company to obtain a cheaper rate, with the bill from the Power Company being made to the Railroad Company and the latter billing the Express Company for the portion it used, plus 10% for transmission line and transformer losses. To obtain the power the Express Company was permitted to tap a line onto the Railroad line which carried power from the Idaho Power Company, and this line went to the substation of the Express Company where LaVerl Johnson was injured. The power was received from the same source. The only change was to have the Railroad collect for the Power Company.

Point 2.

Under the plan referred to in Point 1, the Pacific Fruit Express Company's line from its substation extended across the railroad tracks where it tapped onto the Railroad's line carrying electrical energy from the Idaho Power Company. There was a switch on the pole where this line tapped the Railroad line, and this was the point the Express Company received its power. There was direct and undisputed evidence of this, plus the arrangement between the Railroad and the Express Company that to the bill from the Railroad to the Express Company for its proportion of the power it used would be added 10% for transmission line and transformer losses.

Points 1 and 2 are really immaterial to a decision of this case, in view of the law and the facts set forth and discussed in the succeeding points.

Point 3.

The Pacific Fruit Express Company had exclusive possession of the premises on which the substation is located by virtue of a lease from the Railroad. The Pacific Fruit Express Company accordingly was alone responsible for any injuries resulting from the operation of the substation which it owned, operated, controlled and maintained.

Point 4.

This point discusses further the question of liability and

establishes that the Railroad was not negligent. The substation and the line leading to it were owned, operated, controlled and maintained by the Pacific Fruit Express Company; the station was in good serviceable condition, and without defects. It had operated successfully and safely for 25 years before the accident to Johnson, and its facilities were in proper condition to receive current safely. No reason existed to cut off service to it (R 238).

Upon completion of the construction of the substation many years ago it was accepted by a representative of the Express Company, after which time the responsibility for any failure to make it safe belonged entirely to the Express Company.

Many supporting authorities are cited.

Point 5.

The accident to Johnson was not reasonably foreseeable.

The substation was in good condition as previously related; it was entirely adequate to receive energy safely. It had done so for 25 years without any accidents or injuries. The station was kept locked, with only two keys available, both in possession of officers of the Express Company. There were switches in the substation to deenergize transformers and arrestors. The day Johnson was injured the Railroad knew nothing about what the Express Company proposed to do. It had no knowledge or information that Johnson

was to be sent into the station to paint, or that his supervisors would send him in alone without warning or without deenergizing not only the transformers but the arrestors.

The Railroad had the right to presume the agents of the Express Company would perform their duty and could not reasonably foresee negligent conduct of the Express Company's officers and agents, neither could it reasonably foresee that Johnson would attempt to paint a bare wire leading to the arrestors when he was told to paint cables or taped wires leading to and from the transformers.

Point 6.

If the Pacific Fruit Express Company officers had performed their duty as mentioned in Point 5 this accident would not have occurred. The way in which the station was operated constitutes the sole proximate cause.

Point 7.

If the Railroad owed a duty to anyone, it was solely to the Pacific Fruit Express, and not to Johnson, to let power go over the Express Company's line to its substation, a substation entirely adequate and safe to receive the power. Therefore, the fact that electrical energy was going into the station merely furnished a condition, and not the proximate cause. See points 5 and 6.

Point 8.

This Point is a general discussion of the petition.

It was not the responsibility of the Railroad to make any changes in the substation, if any were needed, or to cut off power to it. It was a good and substantial station without defects, and entirely safe to receive electrical energy, which it had been receiving successfully for 25 years.

It was immaterial, in any event, whether the arrestors were barricaded or put up higher in the station for if LaVerl Johnson thought he was to paint all the bare wires he would have made some arrangement to reach them.

The fact that the signs at the substation did not indicate the function of any switch is beside the point because Johnson testified he did not look for signs.

The National Electric Code by its terms and the Idaho statute with reference thereto, only governed new installations, and in any event, had no application in this case to the Railroad.

Every substation is dangerous if not operated properly. If it had been operated properly as it had been for 25 years there would have been no accident. It was safe if properly operated. The Railroad was not, in any event, an insurer, but that is what petitioners are in effect claiming. If the Railroad is to be held liable in this case, then every automobile manufacturer, or every manufacturer of firearms, would be

responsible for every accident occurring on the theory that they must anticipate that such dangerous instrumentalities, would, at sometime or other, be operated unsafely. The law is entirely otherwise.

The Pacific Fruit Express Company had its own electrician at the substation four or five hours before this accident occurred and at which time the switch was pulled to deenergize the transformers, but the arrestor switches were not pulled even though Express Company laborers were in the cage cutting weeds.—They were warned, and were not injured. LaVerl Johnson was not warned, or he was erroneously warned that the power had been turned off.

Again, if the Express Company officers, before sending Johnson in to paint had disengaged the switches to the arrestors the station would have been perfectly safe for Johnson or anyone else.

The decision of the Court of Appeals is amply supported by the Idaho cases and all others. The Court of Appeals decided the case the only way the law would permit.

Independent Contractor

For the first time petitioners assert the Express Company was an independent contractor and the Railroad should have exercised some care in the selection of the contractor. The Express Company and its employees had performed satisfactorily for 25 years.

Petitioners bring this question up contrary to the Court's

instructions to which they did not except, but in any event, to raise this question brings the case squarely within the provisions of the Idaho statutes and the Idaho decisions thereunder, and makes the Railroad a statutory employer under the Workmen's Compensation Act, and hence the Railroad is not subject to a common law action for negligence. This is another complete defense to this action.

Point 9.

Petitioners evidence does not even present a scintilla. The causes of the accident were so remote they could not be anticipated. The verdict in favor of petitioners was wholly unsupported.

ARGUMENT

Point 1

The Railroad was not selling or delivering electrical energy to the Pacific Fruit Express Company.

The basis of petitioners cause of action is that the Railroad was negligent "in the furnishing of electrical energy *and* in the operation of an electrical substation" (emphasis supplied) (R 3-4).

That the Railroad was not operating the substation is clear (Deft's Exhibits 30, 31, 32 R 262-265, 250-253, 266, 273-274, 294-296, 332-333). When completed the station was accepted for the Pacific Fruit Express Company by Mr. Branum, its representative (R 277). We think it equally clear that the Railroad was not selling or delivering electrical energy to the Pacific Fruit Express Company. The Court of Appeals held that there was a sale of electricity by the Railroad to the Pacific Fruit Express Company, but we think the facts clearly support a contrary holding, for the following reasons:—

The Pacific Fruit Express prior to March 1, 1924, was obtaining its power directly from the Idaho Power Company, but as of that date by combining its needed power with that of the Railroad a cheaper rate could be obtained, so by tapping a line onto the railroad line and constructing a substation it continued to get its electrical energy from the Idaho Power Company, but the energy it used was billed to

the Railroad and the cost thereof paid to the Railroad instead of to the Idaho Power Company (Deft's Ex. 26 R 314-316); the only change that was made actually was the billing. The Railroad was not selling power, it was merely acting as a collection agency for the Idaho Power Company and for the benefit of the Pacific Fruit Express, and no one else. The power still came from the Idaho Power Company (R 144). Further evidence of this is Plaintiff's Exhibit 21 (R 210-211), which is a bill from the Railroad to the Pacific Fruit Express Company, which in part reads as follows:

> "For your proportion for cost of Electric Current furnished at Pocatello, Idaho, in accordance with meter reading for the month: October 22 to November 22 incl. Such current being furnished by the Idaho Power Co., is being billed for in accordance with contract Audit No. 16598 dated June 10, 1930."

Carrying the evidence further, which is consistent with petitioners' proof, was the statement of Mr. Gilbert, the District Foreman of the Idaho Power Company, when asked if he would have advised his Company not to furnish power to the substation he said:

> "A. No, we would not advise them not to deliver energy because the service was always delivered to it,—at that time the substation had not been changed; it was safe at the time we started service and there was no reason why service should have been cut off" (R 238).

The power could come from no other source; the Railroad did not generate it; the Railroad merely permitted a tap onto its line so the Pacific Fruit Express Company could get the same power it had always received from the Idaho Power Company; the Railroad and the Pacific Fruit Express was merely operating on a co-user plan. If the Idaho Power failed neither the Railroad nor the Pacific Fruit Express received any.

Point 2

Power was delivered to Pacific Fruit Express Company where its line tapped onto the railroad line.

The Court of Appeals quite fairly decided this question when it said the electricity passed to the Pacific Fruit Express "not later than the point where the incoming wires went into the substation enclosure". Petitioners in discussing this situation on pages 34 to 36 of their Petition and Brief overlooked the facts. The contract. (Defendants Ex. 26 R 314) states that the Express Company agreed "* * * at its own expense to install and maintain all equipment necessary for the application of said power beyond the point of delivery", and the undisputed evidence in the record is that the electrical energy was delivered to the Express Company at the pole on the Batise or railroad line (R 342) to which the Express Company's line is attached and which carries the current over this line (its own) across the tracks to the substation which it also owns, operates and controls, as we have previously shown. There being direct evidence of the place of delivery

the discussion as to this question should end. The contract, however, in addition to the testimony just referred to, not only sustains the statement of the Court of Appeals but places the point of delivery beyond the substation and at the pole on the railroad line as the witness testified. If delivery was to have been on the secondary side of the transformer where the meter was instead of where it was actually made at the pole on the railroad line, then there would have been no provision for a 10% *transmission line and transformer loss* (R 316). This clearly indicates that the Railroad in effect said to the Pacific Fruit Express "you take this power where your line taps onto ours but you pay 10% for loss over your line and through your substation to the meter on the secondary side". The fact that the meter is on the secondary side rather than some place else is insignificant, for petitioners witness Gilbert stated they are put on either side whichever might be considered better (R 167). There was no other place to put the meter except on some high pole such as the one where the Express Company line taps onto the railroad line, which would have been an impractical location.

The fact that the transformers were to accommodate delivery of approximately 2300 volts has nothing to do with the point of delivery, that merely refers to the capacity of the transformer or the amount of volts the Express Company needed in its business.

This question, we think, becomes immaterial in any event in view of the authorities we refer to under the succeeding points.

Point 3

The Railroad as lessor was not liable.

The Pacific Fruit Express under the lease (Deft's Exhibits 27 and 29, R 322-333, 336-339) had exclusive possession and control of the premises on which the substation was located and the Railroad "owed no duty to supervise his (its) tenant's business to the end that it not be conducted in such a way as to be dangerous", and any liability resulting from the operation of the substation would be that of the lessee Pacific Fruit Express Company.

Olin vs. Honstead, 60 Ida. 211, 91 Pac. (2d) 380, 383, 384;

City of Lewiston vs. Isaman, 19 Ida. 653, 115 Pac. 494;

Goodman vs. Harris, (Cal.) 253 Pac. (2d) 447.

Point 4

The Railroad was not negligent and the opinion of Court of Appeals in that respect was correct.

Petitioners have never cited any cases, and cite no cases herein, and we are certain none can be found, that will establish under the facts of this case any negligence on the part of the Railroad. The authorities are all to the contrary, as we shall establish. Petitioners never proved, and

they could not prove, that the Railroad owed any duty to LaVerl Johnson.

Chatterton vs. Pocatello Post, 70 Ida. 480, 223 Pac. (2d) 389, 20 A. L. R. (2d) 783;

Northern R. Co., vs. Page, 274 U. S. 65;

Palsgraf vs. Long Island R. Co., 248 N. Y. 330, 162 N. E. 99, 59 A. L. R. 1253.

Assuming, for the sake of argument only, that the Railroad was furnishing the energy, it nevertheless was not negligent, for where, as here, the substation and transmission line are owned, operated, controlled and maintained by the Pacific Fruit Express Company the Railroad is not responsible for injuries to persons on such premises.

The subject is annotated in *134 A. L. R.*, with propositions of law stated at pages 508, 511, 515, 517, 518 and 526. The rule stated in the authorities is that where power is merely furnished to a responsible party who owns and controls the poles, wires and appliances which are in proper condition to receive the current safely that the furnishing party is not required at his peril to see that such equipment is kept safe.

Kelly vs. Duke Power Company (4 Cir.) 97 Fed. (2d) 529;

Benard vs. Vorlander (Cal. DCA)
197 Pac. (2d) 42, 45;

City of Cushing vs. Presbury (Okla. 1941),
109 Pac. (2d) 1077;

Hill vs. Pacific Gas & Elec. Co., (Cal.)
136 Pac. 492;

Mullican vs. Meridian Light & R. Co.,
(Miss.) 83 So. 816, 9 A. L. R. 165;

Perry vs. Ohio Valley Elec. R. Co.,
(W. Va.) 74 S. E. 993;

Roberts vs. Pac. Gas & El. Co.,
(Cal. DCA) 283 Pac. 353;

Irelan-Yuba Gold Quartz M. Co., vs. Pacific Gas & Elec. Co., (DCA Cal.) 105 Pac. (2d) 616;

Hoffman vs. Leavenworth Light, H & P. Co.,
(Kan.) 138 Pac. 632, 50 L. R. A. (NS) 574;

Minneapolis General Electric Co. vs. Cronon,
166 Fed. 651, 20 LRA (NS) 816;

Pressley vs. Bloomington-Normal Ry & Light Co.,
(Ill.) 111 N. E. 511;

Memphis Consol. Gas & Elec. Co., vs. Speers,
(Tenn.) 81 S. W. 595;

Burns vs. Carolina Power & Light Co.,
(4 Cir.) 193 Fed. (2d) 525.

We have found no cases which hold a defendant, such as the Railroad Company in this case, liable where it merely permits another to tap a line onto its line and take power from the same source the Railroad receives its power.

In the case at Bar, the evidence is undisputed that there were no defects in any of the equipment, or in the line or in the substation. It was capable of performing its functions safely as it had been doing for 25 years (R 182-183, 203-205, 236-237, 344-345), and there was no reason whatever to cut off the service to it (R 238).

After Mr. Branum on behalf of the Pacific Fruit Express Company accepted the substation and transmission line when completed (R 277) it was the responsibility of the Express Company to maintain and operate it and if as a result of its operation some one is injured it alone would be responsible.

Goar vs. Village of Stephen (Minn.)
196 N. W. 171;

Bogoratt vs. Pratt & Whitney Aircraft Co.,
(Conn.) 157 A. 860;

Howard vs. Reinhart & Donovan Co.,
(Okla.) 166 Pac. (2d) 101.

In the *Bogoratt* case the court said:

"When he accepts work that is in a dangerous condition the immediate duty devolves upon him to make it safe; and if he fails to perform this duty, and a third person is injured, it is his negligence that is the proximate cause of the injury."

Point 5

The extra-ordinary acts and conduct of the officers and agents of the Pacific Fruit Express Company and of LaVerl Johnson were not reasonably foreseeable by the Railroad Company.

The substation was standard when built, and is as capable and safe now of receiving energy as it was at the time it was built (R 236-238, 345-346); there is nothing defective about it or any of the equipment in it (R 236-238, 345); there has never been an injury from the time it was built in 1925 until LaVerl Johnson received an injury in 1950 (R 283); the Pacific Fruit Express had the only keys to the substation, which was always kept locked, and the Railroad had no keys (R 115, 169, 293); there were switches in the substation, not only to deenergize the transformers, but also the lightning arrestors (R 162, 175, 182-183, 239, 286, 304, 345); and if the substation on the day in question had been operated properly by the Pacific Fruit Express Company the injuries to LaVerl Johnson would not have occurred (R 183, 203-204, 209, 237-239, 246, 345).

Irrespective of any other facts petitioners have presented

there is absolutely nothing in the record to establish that the Railroad Company knew or had reason to believe that La-Verl Johnson was to go into the substation on Saturday afternoon November 4, 1950, or at any other time. It could not reasonably anticipate that he or anyone else would be given the keys to enter this substation unaccompanied (that had never occurred before). It had no reason to believe that if he or anyone else was sent in to the substation that he or they would not be warned of the dangers; that he would not be warned that the switches leading to the lightning arrestors had not been pulled, or that these lightning arrestor switches would not be pulled if Johnson had any work in or about the arrestors. Neither could the Railroad anticipate that Johnson, having been instructed to paint cables or wires leading to and from the transformer in the large transformer cage the same as he did in the smaller transformer cage, would ignore such instructions and proceed to a point 12 to 15 feet behind the transformer and take hold of a bare wire leading to the arrestor.

A defendant is not responsible for a consequence which is merely possible according to occasional experience, but only for those consequences which are probable according to ordinary and usual experience.

Probart vs. Idaho Power Company, 74 Ida. 119, 258 Pac. (2d) 361;

Antler vs. Cox, 27 Ida. 517, 149 Pac. 731;

Atchison T & S.F. Ry. Co., vs. Calhoun, 213 U.S. 1, 53 L. Ed. 671;

Charnock vs. Texas & P.R. Co., 194 U.S. 432, 48 L. Ed. 1057;

The President Madison (9 Cir.) 91 Fed. (2d) 835, 841;

Cole vs. German Sav. & L. Soc., 124 Fed. 113, 63 L.R.A. 416;

Garrison vs. St. Louis & S.F. Ry. Co., (Kan.) 271 Pac. (2d) 307, 311;

Hair vs. City of Lynchburg (Va.) 181 S.E. 285, 287;

Palsgraf vs. Long Island R. Co., 248 N.Y. 330, 162 N.E. 99, 59 A.L.R. 1253; (Decision by Justice Cardozo)

Every person has the right to presume that every other person will perform his duty and in the absence of reasonable ground to think otherwise it is not negligence to assume that one is not exposed to dangers which come to him only from violation of law or duty by such other person.

Leo vs. Dunham (Cal.) 264 Pac. (2d) 1, 3;

Richards vs. Stanley (Cal.) 271 Pac. (2d) 23, 27.

Point 6

The manner and method of the operation of the substation by the Pacific Fruit Express Company prior to and at the time LaVerl Johnson was sent into the substation to work by the officers and agents of the Pacific Fruit Express Company constituted the proximate cause.

Splinter vs. City of Nampa, 74 Ida. 1, 256 Pac. (2d) 215;

Chatterton vs. Pocatello Post, 70 Ida. 480, 223 Pac. (2d) 389, 20 A.L.R. (2d) 783;

Antler vs. Cox, 27 Ida. 517, 149 Pac. 731;

Clark vs. Chrisop, 72 Ida. 340, 241 Pac. (2d) 171;

Atchison, T & S. F. Ry., Co. vs. Calhoun, 213 U.S. 1, 53 L. Ed. 671;

Pittsburg SS Company vs. Palo (6 Cir.) 64 Fed. (2d) 198, 200, 201;

Cole vs. German Sav. & L. Society, 124 Fed. 113, 63 L.R.A. 416;

United States vs. Rothschild International Steve. Co., (9th Cir.) 183 Fed. (2d) 181;

Hair vs. City of Lynchburg (Va.) 181 S.E. 285, 287;

Stackpole vs. Pacific Gas & Electric Co., (Cal.) 186 Pac. 354;

Georgia Power Company vs. Kinard, (Ga.) 170 S.E. 688, 691;

Leavitt vs. Stamp (Ore.) 293 Pac. 414;

Woodruff vs. Bowen (Ind.) 34 N.E. 1113;

Harter vs. Colfax Electric Light & Power Co., (Iowa) 100 N.W. 508;

Johnson vs. Union Furniture Company, (Cal. DCA) 87 Pac. (2d) 917.

Point 7

The transmission of energy to the substation irrespective of how it got there or who was responsible for getting it there merely furnished a condition which would not constitute the proximate cause.

Chatterton vs. Pocatello Post, 70 Ida. 480, 223 Pac. (2d) 389, 20 A.L.R. (2d) 783;

Splinter vs. City of Nampa, 74 Ida. 1, 256 Pac. (2d) 215;

Antler vs. Cox, 27 Ida. 517, 149 Pac. 731;

Rowe vs. Northern Pacific Ry., 52 Ida. 649, 17 Pac. (2d) 352;

Cole vs. German Sav. & L. Society, 124 Fed. 113, 63 L.R.A. 416;

Hauser vs. Pacific Gas & Electric Co., (Cal. App.) 23 Pac. (2d) 1068;

Leavitt vs. Stamp, (Ore) 293 Pac. 414;

Seith vs. Commonwealth Electric Company, (Ill.) 89 N.E. 425.

Point 8

Discussion of the Petition in general.

It was not the responsibility of the Railroad to make any changes in the substation if any were needed, or to cut off power going into the station, for it was a good substantial substation without defects, and, as the evidence shows without dispute, was entirely safe and capable of receiving the energy as it had done for 25 years and without accidents.

Whether the lightning arrestors should have been barricaded or put up higher in the substation out of reach certainly imposed no liability on the Railroad. As a matter of fact, if the arrestors had been barricaded or placed higher

up in the substation when Johnson went into it he would have gotten to the same wire of the arrestor in some manner because he thought he was to paint all the bare wires. If he thought he was following instructions he would have gone over any barrier or would have used a ladder to reach the wires if they had been placed higher and out of reach.

The fact that the pole-top switch in the substation or other signs thereat failed to mention that the pole-top switch only disconnected the power to the transformer is clearly immaterial for LaVerl Johnson testified he looked for nothing of the sort when he went in (R 228).

Section 54-1001 *Idaho Code*, adopting the National Electric Code, was first passed and approved in 1947. It says that installations "from and after the taking effect of this Act", etc., shall be in substantial accord with the National Electric Code. The substation was built in 1925.

If the Code was applicable to the substation after 1947, (and we think it was not for Rule 91 B of the Code stated that the intent of the rules will be realized "by applying the rules in full to new installations, reconstructions, and extensions,") then it had application only to the Pacific Fruit Express Company in the situation at hand and not to the Railroad.

The remarkable thing about all of petitioners testimony concerning the substation is that neither the State Inspector Rising, or Gilbert, testified they had ever told the Express

Company to do anything .bout the substation either before or after the accident. The testimony of Rising and Smith particularly was hindsight.

Every substation is dangerous no matter how it is constructed. That is the reason they are fenced and kept locked. If petitioners theory in this case is correct then every person or firm supplying power is an insurer and no company generating and supplying electricity would ever be without liability. The cases, however, as we have shown, are all to the contrary and state the law to be that there is no liability on the part of one delivering power to equipment owned, operated, maintained and controlled by others.

This substation, we think, is comparable to an automobile, or any other agency, dangerous or otherwise. If properly operated it is safe. If petitioners theory is correct then the manufacturer or dealer of automobiles, or manufacturer of firearms, could be held liable on the theory that they had placed in the hands of people a dangerous instrumentality and should anticipate that someone would operate them in an unsafe way or use them unsafely. Such a theory is so far-fetched that no one, we think, would consider it for a minute.

The fact that the substation might be dangerous is not enough: all of them are if not operated properly. If the switch on the line which supplies energy to the transformers had not been pulled and Johnson had been injured there the substation would have been dangerous. It was dangerous

when Johnson went in on the day of his injury because the disconnect switches to the arrestors had not been pulled and his boss told him the power was off, when it wasn't. Johnson went in to paint leads or cables to and from the transformers; the power to them was off, and Johnson's supervisor, undoubtedly relying on what he had told him to do, failed to tell him the power to the arrestors had not been cut off. Such warning had been given to the laborers cutting weeds in the station that morning. Nevertheless the disconnect switches on the arrestors had not been pulled and petitioners own witnesses testified if these had been pulled to cut off the power to the arrestors then the substation would have been perfectly safe for Johnson (R 182-183, 203, 237, 239).

The substation was a safe place to work if it had been properly supervised and operated. The accident was not caused by any breach of duty or negligence on the part of the Railroad but the dangerous situation was created entirely by the Pacific Fruit Express Company without any knowledge on the part of the Railroad. *Austin vs. Riverside Portland Cement Company* (DCA Cal.) 271 Pac. (2d) 943, 948.

Petitioners have consistently refused to recognize the fact that the Pacific Fruit Express Company had a qualified electrician at the substation the morning of the accident. Melvin Judge was its electrician (R 307). He and the two other Johnsons were in the substation this particular morning changing or inspecting transformer oil and there was no one there from the Railroad (R 303-304, 308-309). Pacific Fruit Express Company laborers were inside the cage at that

time cutting weeds (R 303,309). These laborers were warned that the arrestors had not been deenergized and none of them were hurt (R 310, 313); the Johnsons and Judge were the last out and locked the gate (R 304, 309). These men knew the arrestors had not been deenergized, they, if anyone, knew what the Pacific Fruit Express was proposing to do that day, and the Railroad did not know, yet one of the Johnsons, LaVerl's supervisor, gave him the key and sent him in alone with instructions to paint transformer cables without making the substation safe by pulling the switches or warning LaVerl they were not pulled. It was a simple matter for either Howard Johnson, J. E. Johnson, or Melvin Judge to have disconnected the switches to the arrestors and if that had been done the station would have been as safe as one's own home, perhaps safer. This is not, and cannot be, disputed.

Petitioners' witness Smith testified over defendant's objection as to what the law was, and to the effect that where the substation was hazardous the current should be turned off. Of course, this testimony was inadmissible for two reasons,—first, it was the duty of the court to instruct as to the law, and secondly, the law, as we have demonstrated, is otherwise. It was unnecessary for the Court of Appeals to decide this, as well as other errors, because the facts and the law make it clear that the railroad could not be held liable.

We do not agree with the statement of Petitioners on pages 15 and 16 of the petition that the trial court's instructions were correct. They were not correct, but, as we

understand the situation, this proceeding involves only a determination of whether this Court should review the action of the Court of Appeals, which was correct in holding that the Railroad was not liable.

We think the opinion of the Court of Appeals was in effect based on the Idaho law, or on law concerning which there is no dispute. The Idaho cases referred to herein fully support the opinion of the Court of Appeals. Certainly the Idaho Supreme Court would be expected to follow the rule of law, announced by the cases from other jurisdictions, upon which there is no dissent, namely; that it is not negligence for a supplier of electricity to furnish energy to a responsible party who owns, operates, controls, and maintains the poles, wires and appliances which are in proper condition to receive current. The Idaho decisions establish that negligent operation of an installation, such as was done by the Pacific Fruit Express Company, constituted the active independent, intervening cause, and hence the proximate cause of any resulting injury. *Splinter vs. City of Nampa*, 74 Ida. 1, 256 Pac. (2d) 215; *Chatterton vs. Pocatello Post*, 70 Ida. 480, 223 Pac. (2d) 389; 20 ALR (2d) 783; *Antler vs. Cox* 27 Ida. 517, 149 Pac. 731.

Petitioners have never cited or referred to any decisions, either from Idaho or elsewhere, which sustain their contention that the Railroad was liable in this case. The Chase case has no application, for there the defendant constructed, owned, operated and maintained the equipment involved; actually we think the case has ceased to be authority since the decision

of the Idaho Supreme Court in the case of *Probart vs. Idaho Power Company*, 74 Ida. 119, 258 Pac. (2d) 361.

The Younie case has no application for the same reason the Chase case is inapplicable. The negligence in the Younie case related to the erection, operation and maintenance of defendant's plant. It might possibly have some application in a suit against the Pacific Fruit Express, but not against the Railroad.

No Idaho case referred to by petitioners even comes close to forecasting a decision in their favor.

Independent Contractor

Now for the first time petitioners refer to liability of one employing an independent contractor. They say that where one engages a contractor to carry out an undertaking involving hazard he must exercise some care in the selection as to fitness and ability. Assuming that statement to be true, there is no evidence that the Railroad was guilty of any negligence in contracting with the Pacific Fruit Express Company to perform its work. This substation had been operated by the Pacific Fruit Express Company without neglect for 25 years. The Railroad certainly had the right to assume that such good conduct would continue.

Petitioners took no exceptions to the instructions of the Court that "as to the Pacific Fruit Express, none of their acts are to be charged against the Union Pacific" (R 386). This instruction was correct. *Perry vs. Ohio Valley Elec. R. Co.*,

(W. Va.) 74 S.E. 993; 14 C.J. 58, Sec. 19; 14 C.J. 873, Sec. 1332.

In connection with this feature, petitioners say that the Pacific Fruit Express furnishes cars and protective services, including refrigeration or heater services, for the Union Pacific, (R 314, 359-360); the substation and line leading to it was to be used in the performance of that work. The testimony referred to is correct, and puts this case directly within the provisions of Sections 72-1010 and 72-811 Idaho Code, which are quoted in full in the Appendix.

These Sections and the decisions thereunder make the Railroad a statutory employer and accordingly not subject to a common law action based on negligence, which the case at Bar is.

Fisk vs. Bonner Tie Company, 40 Ida. 304, 232 Pac. 569;

Gifford vs. Nottingham, 68 Ida. 330, 193 Pac. (2d) 831;

Modlin vs. Twin Falls Canal Co., 49 Ida. 199, 286 Pac. 612;

Hiebert vs. Howell, 59 Ida. 591, 85 Pac. (2d) 699;

Brown vs. Arrington Const. Co., 74 Ida. 338, 262 Pac. (2d) 789.

This is another complete defense to this action.

Trial Court vs. Court of Appeals

There is nothing in this case which would prevent the judges of the Court of Appeals from correctly interpreting any of the Idaho cases, or of any of the other cases. The cases establish the law and not the length of time a person has practiced in Idaho. In any event, petitioners had or have no cases from Idaho, or elsewhere, to establish liability on the part of the Railroad.

While not pertinent herein, petitioners state respondent's attorneys neither moved for a new trial or urged as error on appeal any instructions remotely resembling the delineation of a seller's duty enunciated by the Circuit Court. We have always contended that the Railroad was not a seller of electrical energy, and still so contend, and we think counsel for petitioners, in making the statement they did are incorrect (R 390 par. VI R 25).

Point 9

Petitioners evidence was wholly insufficient to support a verdict in their favor.

The weight of the evidence must be more than a scintilla before the case may be properly left to the discretion of the triers of fact and bare possibility is not sufficient. Events too remote to require reasonable prevision need not be anticipated. *Hoffer vs. City of Lewiston* 59 Ida. 538, 85 Pac.

(2d) 238; *Brady vs. Southern R. Co.*, 320 U.S. 476.

The case for petitioners is left without any substantial support in the evidence and a verdict in their favor could only rest upon mere speculation and conjecture, which cannot supply the place of proof. *Pennsylvania R. Co. vs. Chamberlain*, 288 U.S. 333, 77 L. Ed. 819; *Moore vs. Chesapeake & O. Ry. Co.*, 184 Fed. (2d) 176, 179; affirmed in 340 U. S. 573, 95 L. Ed. 547, 550-551; *Hawley vs. Alaska Steamship Company* (9th Cir.) 236 Fed. (2d) 307.

There are no adequate reasons for the granting of a Writ of Certiorari.

The opinoin of the Court of Appeals, and the showing made herein, definitely establish no liability on the part of the Railroad Company, hence no violation of the Seventh Amendmnt or of any other part of the Constitution. This case involves no federal statutes and in fact no federal question of any sort, and hence no "important" question of federal law which should be settled by this Court. Neither has the Court of Appeals departed from any accepted and usual course of judicial proceedings which calls for any exercise of this Court's power of supervision. The Court of Appeals has done only what this Court has done on many occasions when the facts show no liability on the part of the defendant. Some of these cases are,—

Pennsylvania R. Co., vs. Chamberlain,
288 U. S. 333, 77 L. Ed. 819;

Brady vs. Southern R. Co., 320 U.S. 476, 88 L. Ed. 239;

Eckenrode vs. Pennsylvania R. Co., 335 U.S. 329, 93 L. Ed. 41;

Moore vs. Chesapeake & Ohio Ry. Co., 340 U.S. 573, 95 L. Ed. 547.

The rule in Idaho is the same.

Chatterton vs. Pocatello Post, 70 Ida. 480, 223 Pac. (2d) 389, 20 ALR (2d) 783;

Probart vs. Idaho Power Company, 74 Ida. 119, 258 Pac. (2d) 361.

The case at Bar is a diversity case involving only the question of general common law negligence. There is no question of such gravity and general importance as to require the review of the conclusions of the court of appeals. *Ex Parte Woods*, 143 U. S. 202, 36 L. Ed. 125.

Rule 19 of this Court requires "special and important reasons" for granting the writ of certiorari, and "Certiorari is granted only in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties * * *" and the Court does not review decisions of the Court of Appeals which turn solely on the evaluation of testimony. *National Labor Relations Board vs. Pittsburgh Steamship Company*, 340 U. S. 498, 503, 95 L. Ed. 479, 483; *Rice vs. Sioux City Cemetery*, 349 U. S. 70,

99 L. Ed. 897.

Petitioners here seek nothing more and nothing less than the reappraisal of the evidence of an isolated case which three competent and experienced Judges of the Court of Appeals after full and mature consideration unanimously and correctly agreed as a matter of law that the evidence did not establish negligence on the part of the Railroad Company.

CONCLUSION

We respectfully submit that the Court of Appeals did no err in its analysis of the evidence in this case and that th Court correctly decided that there was no evidentiary basi for a finding of negligence on the part of Respondent an that the Petition for Writ of Certiorari be denied.

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APPENDIX

IDAHO CODE

72-811. CONTRACTORS AND SUBCONTRACTORS.—An employer subject to the provisions of this act, shall be liable for compensation to an employee of a contractor or subcontractor under him or who has not compiled with the provisions of section 72-801 in any case where such employer would have been liable for compensation if such employee had been working directly for such employer. The contractor or subcontractor shall also be liable for such compensation, but the employee shall not recover compensation for the same injury from more than one party. The employer who shall become liable for and pay such compensation may recover the same from the contractor or subcontractor for whom the employee was working at the time of the accident. This section shall be in force as to all contracts made subsequent to March 15, 1921. (C. S. Sec. 6287A as added by 1921, ch. 217, Sec. 19, p. 474; I. C. A., Sec. 43-1611.)

72-1010. EMPLOYERS.—"Employer," unless otherwise stated, includes any body of persons, corporate or unincorporated, public or private, and the legal representative of a deceased employer. It includes the owner or lessee of premises, or other person who is virtually the proprietor or operator of the business there carried on, but who, by reason of there being an independent contractor, or for any other reason, is not the direct employer of the workmen there employed. If the employer is secured it includes his surety so

INDEX

	Page
Basic Points of the Petition Are Not Controverted by Respondent	1
Respondent's Arguments on Other Grounds to Support the Decision Below Are Without Merit	4
As to Relation to Independent Contractor	6
Other Points Urged in Respondent's Brief Are Not Pertinent	7
Conclusion	8

CITATIONS

CASES:

Fisk v. *Bonner Tie Co.*, 40 Idaho 304, 232 Pac. 569	6
Gaulden v. *Southern Pac. Co.*, 78 F. Supp. 651 (N. D. Cal. 1948) aff'd 174 F. 2d 1022	6
Jones v. *Packer John Mines Corp.*, 60 Idaho 653, 95 P. 2d 572	7
Joslin v. *Idaho Times*, 60 Idaho 235, 91 Pac. 2d 386	6
Moon v. *Ervin*, 64 Idaho 464, 133 P. 2d 933	6
Palmer v. *J. A. Terteling & Sons*, 52 Idaho 170, 16 P. 2d 221	7

STATUTES AND TEXTS:

Idaho Code, Section 72-1010	6
Morris, Proof of Safety History in Negligence Cases, 61 Harv. L. Rev. 205	3
2 Restatement, Torts, sec. 302 comment l, p. 821	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 573

LAVERL JOHNSON and JOLEEN JOHNSON, husband and wife, and PACIFIC FRUIT EXPRESS COMPANY, *Petitioners,*

v.

UNION PACIFIC RAILROAD COMPANY, a corporation.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONERS

The respondent's brief in opposition does not meet the petition. In the main it merely urges contentions made in the court below and either there expressly rejected or not passed upon.

BASIC POINTS OF THE PETITION ARE NOT CONTROVERTED BY RESPONDENT

Only in Points 8 and 9 (Resp. Br., pp. 31-40) does respondent purport to touch on the reasons for granting the writ urged in the petition. Even there, respondent is significantly silent on two important points:

1. Respondent does not attempt to negative petitioners' assertion that the court of appeals in deciding the question of law presented by the denial of motions for directed verdict and for judgment notwithstanding the verdict, ignored the clear rule of this Court that the reviewing court must assume as established all facts in support of plaintiff's claim that the evidence reasonably tends to prove .

2. Respondent does not attempt to reconcile the court of appeals holding that the evidence showed that the substation could be operated safely by the trained and safely by the untrained if properly cautioned and that the customer had merely failed to put in the latest safety devices, with petitioners' record evidence that the design and construction of the substation was unreasonably dangerous, both to the trained and the untrained.

These were the basic errors pointed out by the petition for writ of certiorari.

But after reading respondent's brief one might well ask: "In whose favor was the verdict in the trial court?" For respondent's argument would be valid only if the verdict were for the defendant. Respondent seeks here to perpetuate the errors into which it led the court below by its reiterated reliance on the assertion that—

> "The substation was standard when built, and is as capable and safe now of receiving energy as it was at the time it was built (R. 236-238, 345-346); there is nothing defective about it or any of the equipment in it (R. 236-238, 345); there has never been an injury from the time it was built in 1925 until LaVerl Johnson received an injury in 1950 (R. 283).

This theme reiterated with minor variations throughout the brief (Resp. Br., pp. 4-5, 13, 26, 31, 36) is based on testimony that is at best merely conflicting in favor of defendant.[1] In passing on the correctness

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[1] On analysis, the respondent's record citations fall short of supporting the inferences it here urges and was able to persuade the court below to accept:

As to conformity of construction to standards in 1925.—As the petition points out (p. 39), under Idaho law the standard of required "ordinary care" is "what a reasonably prudent man would do under like circumstances" and is not concluded by prevailing custom or the fact that the station was "standard" at the time it was built.

As to absence of accident for 25 years.—The mere failure of an obviously dangerous trap to catch a victim for twenty-five years can have but little evidential weight. See Morris, Proof of Safety History in Negligence Cases, 61 Harv. L. Rev. 205, 210, 214, 222-223, 234-235. Respondent received the full benefit of this evidence in having it considered by the jury.

As to ability of the substation "to receive electrical energy safely".—Respondent places great store on this testimony but scrutiny shows it was addressed, not to the question of safety of persons in the enclosure, but narrowly to whether the substation and equipment were safe "for the delivery of electrical energy" (R. 236), "capable of receiving electrical energy safely" (R. 237), "whether or not that substation was operating effectively so far as delivering electrical energy to it" (R. 345).

This distinction was emphasized in the examination of Mr. Gilbert to which respondent cites (R. 237):

> "Q. Can you state whether or not it was capable of receiving safely energy that was being delivered to it?
>
> "A. Yes sir, that could be delivered safely as long as the gate was locked, am I making myself clear?" (Emphasis supplied)

That the linguistic and grammatical distinction was intentional is confirmed by the same witness's further testimony (R. 239):

> "No man should have been in that yard unless he was qualified. The wires were low and there was a possible chance of tripping or falling or reaching to them, that is a hazard that we watch if there is anything hot and a man is in the yard."

of the denial of the motion for directed verdict and for judgment notwithstanding the verdict, the court below obviously could not, in conformity with the rule established by this Court, even consider, much less accept such evidence for respondent as against the conflicting testimony for plaintiff. No more may it be relied on now to support the appellate court's reversing judgment.

RESPONDENT'S ARGUMENTS ON OTHER GROUNDS TO SUPPORT THE DECISION BELOW ARE WITHOUT MERIT

Respondent fails to compare the appellate court's fact findings with plaintiff's evidence but argues (Resp. Br., pp. 31-32) that failure of the respondent to withhold electrical energy until the arresters in the substation were barricaded or put higher, out of reach, imposed no liability on it because—

> "when [plaintiff] Johnson went into it he would have gotten to the same wire of the arrester in some manner because he thought he was to paint all the bare wires." (Resp. Br., p. 32)

This is vitiated by petitioner's testimony (R. 227):

> "No, he [H. O. Johnson] said to paint all of *the wires that I could reach.*" (Emphasis supplied)

Respondent also attacks the materiality of evidence of absence of signs calling attention to the fact the pole-top switch did not operate the arrester disconnects (Resp. Br., p. 32). Such absence obviously aggravated the unreasonable risk created by the misleading hook-up of the pole-top switch and the unprotected 12,500 volt wires to the lightning arresters.

The National Electrical Code safety provisions adopted by Idaho statute in 1947 were not only applicable to Pacific Fruit (Resp. Br., p. 32) but as well pertinent on the question of what was ordinary care by respondent, as a prudent man, to eliminate the unnecessary danger, thus officially recognized, and known to respondent to exist in this particular substation.

It is next argued (Resp. Br., p. 33) that because a substation is necessarily dangerous in character, respondent cannot be held liable even though it supplied electricity in death-dealing voltages with knowledge that, over and above the inherent dangers, the easily-remedied hazardous design and construction of the substation subjected all persons, including non-electricians, who it knew were occasionally sent into the enclosure by the customer, Pacific Fruit, to unnecessary risk of grave injury or death from the current it supplied. Clearly foreseeable was the probability that injury would occur through ignorance or momentary lapse, either of the person injured or of some third person in failure to disconnect the lightning arresters, in forgetting that they were not disconnected, in assuming that they were disconnected or failing to warn that they were not disconnected. The court of appeals recognized no such rule as respondent lays down and it is a commonplace that occasional negligence "is one of the ordinary incidents of human life and therefore to be anticipated, particularly if there is little or no utility in the creation of the situation and the harm likely to be done is something more than trivial." 2 Restatement, Torts, sec. 302, comment l, p. 821.

Relation to Independent Contractor

Petitioners cited *Joslin* v. *Idaho Times,* 60 Idaho 235, 91 Pac. 2d 386, as further evidence that the court of appeals might have reached a different conclusion had it considered Idaho decisions. Respondent now urges that under cited sections of the Idaho Workmen's Compensation Law, it is to be regarded as the proprietor or operator of petitioner's business and hence, within the meaning of the law the employer of the petitioner and exempt from common law action (Resp. Br., pp. 37-38). However, Idaho decisions do not support this argument.

As pointed out in *Gaulden* v. *Southern Pac. Co.,* 78 F. Supp. 651 (N. D. Cal. 1948) aff'd 174 F. 2d 1022, (9th Cir. 1949) the two companies here involved are engaged in different businesses: One is a common carrier, the other in the business of renting refrigerator cars to railroads or shippers and providing protective service in the transportation of perishable commodities. Pacific Fruit is an independent contractor not engaged exclusively in performing such services for the respondent. It rents its cars to other common carriers and also provides heater and refrigerator protection to other carriers.

Idaho Code, Section 72-1010 does not operate if the contractor is in an independent business and not engaged exclusively in performing the proprietor's work. See *Fisk* v. *Bonner Tie Co.,* 40 Idaho 304, 232 Pac. 569, 571. Furthermore, the contractee to be charged as an employer under section 72-1010 must be shown to be the proprietor or operator of the business being carried on by the contractor. *Moon* v. *Ervin,* 64 Idaho 464, 133 P. 2d 933, 935. The work being done by the employee at the time of the injury must pertain

to the business, trade or occupation of the third person sought to be charged as employer. *Palmer* v. *J. A. Terteling & Sons,* 53 Idaho 170, 16 P. 2d 221, 223; see *Jones* v. *Packer John Mines Corp.,* 60 Idaho 653, 95 P. 2d 572, 573.

For these reasons respondent does not come within the statutes it cites, as is confirmed by its failure so to plead in this case.

Other Points Urged in Respondent's Brief Are Not Pertinent

The other grounds suggested by respondent for sustaining the decision of the court of appeals were either rejected by that court or not passed upon. None of them cures or makes moot the errors of which petitioners complain nor constitutes ground for denying certiorari. While this Court has power on certiorari to direct such disposition of the case as the court of appeals might have made, none of respondent's points independently sustain the action of the court below:

Point 1 (Resp. Br., p. 18). As respondent admits, the court of appeals, specifically rejected respondent's contention that it was not selling electricity to Pacific Fruit (Pet. App., p. 49).

Point 2 (Resp. Br., p. 20). Respondent merely urges as conclusive testimony of its witness that the electrical energy was delivered to Pacific Fruit at the junction pole on the Batiste line. But this was merely a conclusion of a witness who had no better basis for determination of the question, if as good, than did the jury. Since the court below undertook to decide the question where title to the electricity passed (Pet. App., p. 50) the Idaho statutory and decisional law under the Uniform Sales Act became pertinent.

Point 3 (Resp. Br., p. 22). Liability has not been asserted against respondent in its lessor capacity.

Point 4 (Resp. Br., p. 22). This argument is based on respondent's evidence in conflict with petitioners'. Furthermore the cited authorities merely negative any duty to inspect. Some of them specifically recognize duty to shut off the current to privately owned wires and apparatus where, as here, the supplier has actual knowledge of unreasonable risk of injury or death if current continues to be supplied.

Point 5 (Resp. Br., p. 26). This point was resolved against respondent by the court below (Pet. App., p. 52).

Points 6 and 7 (Resp. Br., pp. 29-30). These points both deal with causation which the court noted as a question but refused to pass upon (Pet. App., p. 52 note).

CONCLUSION

The record remains clear that the court of appeals failed even to recognize the applicable law and proceeded to retry the facts in derogation of petitioners' right to a jury trial. It failed even to consider the facts adduced in support of petitioners' claim and instead tested the verdict solely by reference to an interpretation in favor of respondent of what was, at best, merely conflicting evidence for respondent. Its failure to consider Idaho decisions is also manifest.

Most significantly, respondent in this Court does not attempt to show that the court below did follow the correct rule of law in exercising its review function. Neither does respondent attempt to show that, evaluated with due regard for that rule, petitioners' evidence was inadequate as a matter of law to sustain

the verdict. Instead respondent merely clings tenaciously to its own interpretation of evidence most favorable to it as the premise for the arguments here advanced.

Since these undefended errors of the court below clearly violate petitioners' right to jury trial as well as the Rules of Decision Act, it is submitted that there is clearly presented appropriate occasion for the exercise of this Court's certiorari jurisdiction.

Respectfully,

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December, 1956

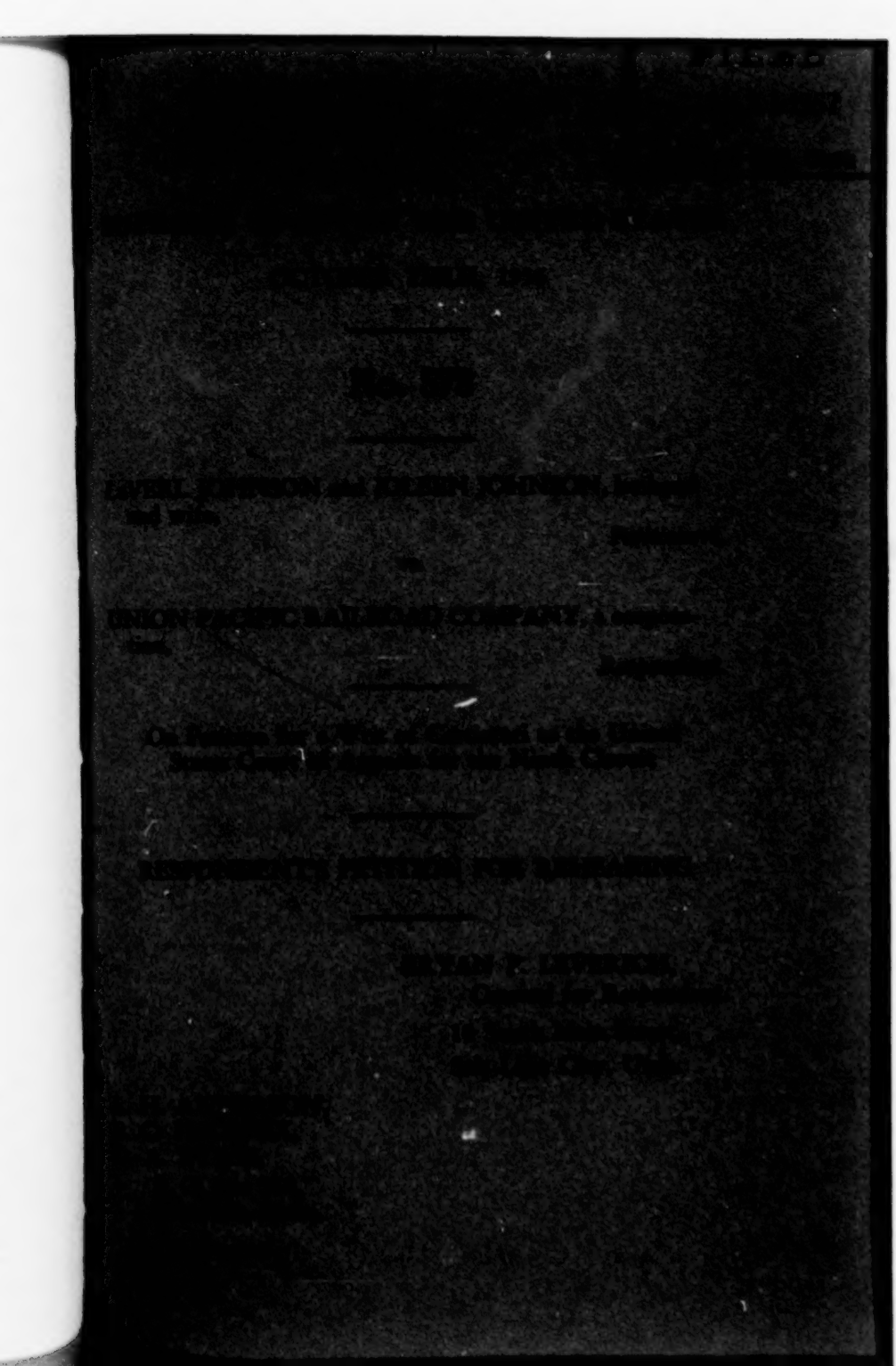

TABLE OF CONTENTS

	Page
RESPONDENT'S PETITION FOR REHEARING	1
STATEMENT	2
ARGUMENT	3
1. *The Russell case does not support the theory that the Railroad was negligent as to Johnson in the case at bar*	3
2. *The Russell case supports the Railroad and not the Johnsons*	10
CONCLUSION	12
CERTIFICATE OF COUNSEL	12

TABLE OF CASES CITED

Jelf vs. Cottonwood Falls Gas Company, (Kans.) 178 Pac. (2d) 992	8
Koch vs. Telluride Power Company, (Utah) 209 Pac. (2d) 241	8, 9
Russell vs. City of Idaho Falls, (not officially reported)	1 to 11 inclusive
Union Pacific Railroad Company vs. Johnson, 233 Fed. (2d) 427	10

STATUTES CITED

Idaho Code, Section 72-811	11
Idaho Code, Section 72-1010	11

TEXTS CITED

134 A. L. R. 507	7
29 C. J. S. 611, Sec. 57	7, 8

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 573

LaVERL JOHNSON and JOLEEN JOHNSON, husband and wife,

Petitioners,

vs.

UNION PACIFIC RAILROAD COMPANY, a corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENT'S PETITION FOR REHEARING

Union Pacific Railroad Company, respondent herein, respectfully prays for a rehearing or reconsideration of the Order of this Court dated January 14, 1957, granting the Petition for Writ of Certiorari herein and reversing the judgment of the Court of Appeals for the Ninth Circuit on authority of *Russell* vs. *City of Idaho Falls,* No. 8431, decided by the Supreme Court of Idaho December 24, 1956, and in support of said Petition respectfully shows:

I.

The Order of this Court dated January 14, 1957 was entered before Respondent was afforded any real opportunity to answer Petitioners' argument based on the decision of the Supreme Court of Idaho in the case of *Russell* vs. *City of Idaho Falls;* and the majority opinion of this Court . . . misinterprets the effect of the decision of the Idaho Supreme Court in *Russell* vs. *City of Idaho Falls,* referred to in said Order of January 14, 1957, and the Court accordingly erred in reversing the Judgment of the Court of Appeals for the Ninth Circuit.

STATEMENT

On January 12, 1957, respondent received Petitioners' Supplemental Brief, attached to which was the full opinion of the Idaho Supreme Court in Case No. 8431, designated *Beatrice P. Russell and Walter C. Musgrave, State Insurance Manager, State of Idaho, Plaintiffs-Appellants,* vs. *City of Idaho Falls, a municipal corporation, and Union Pacific Railroad Company, a corporation, Defendants-Respondents,* decided December 24, 1956. On the same day Respondent's counsel wrote a letter to Mr. John T. Fey, Clerk of this Court, with a copy to Mr. William D. Donnelly, of Counsel for Petitioners, which letter in part reads as follows:

> "Not knowing whether we have the right to respond to Petitioners' Supplemental Reply Brief, a copy of which Mr. Leverich received today, or whether, if we might respond, there is time to do so, I hasten to write you this letter, with the approval of Mr. Leverich and over his signature, because we don't want the Court to conclude by our silence that we agree the *Russell* case referred to in Petitioners' Supplemental Brief is favorable to petitioners or is

> against our position in the case at Bar. It is not. We submit it does not support the position of petitioners but does in fact support respondent's position, and if petitioners' Supplemental Brief is to be considered by the Court we would appreciate it if the Court could also have our comments which follow. Whatever expense there might be in doing so we will, of course, be glad to pay."

Our comments which followed are somewhat enlarged herein.

On January 19, 1957, Mr. L. H. Anderson, of counsel for respondent, received a letter from Mr. E. P. Cullinan, Assistant Clerk of this Court, dated January 15, 1957, which reads as follows:

> "Your letter of January 12th reached this office on January 14th, too late to present to the Court before its rendition of the per curiam order in the above-entitled case."

ARGUMENT

We will discuss the *Russell* decision under two headings:

1. *The Russell case does not support the theory that the Railroad was negligent as to Johnson in the case at bar; and*

2. *The Russell case supports the Railroad and not the Johnsons.*

1.

The Russell case does not support the theory that the Railroad was negligent as to Johnson in the case at bar.

In the *Russell* case the Stockyards Company at its own expense constructed the office building and barn, such con-

struction including the wiring and installations in said buildings. In so doing so no ground or fuses were provided at the barn although apparently required, and the ground wire at the office building should have been attached to the water pipe instead of the driven ground rod. It was accordingly a definite and certain defective or negligent installation. Also, the City's transformer was defective; it had been rendered defective by an electrical storm on August 12, 1954, or about three weeks prior to the time Russell was electrocuted. The defect is clearly set out by the Court on page 3 of its decision.

The City of Idaho Falls was not only generating but was delivering the energy to the lines of the Stockyards Company, while in the case at bar we submit the Idaho Power Company rather than the Railroad Company was the supplier of the energy; the Railroad was neither generating nor selling power to the Pacific Fruit Express Company. *See Point 1 of Respondent's Brief.* The Express Company was merely permitted to attach its line onto the Railroad line and obtain power from the same source as the Railroad obtained its power, to-wit: from the Idaho Power Company.

The Express Company obtained this power at the railroad line across the tracks from the Express Company's substation and from there to the substation it was the Express Company's power, was under its control and owned by it. *See Point 2 of Respondent's Brief.*

In the case at bar, as distinguished from the *Russell* case, there was not a defect of any kind at any place and the substation was standard when built in about 1925, and continued without defects up to and at the time of Johnson's injuries to be safe and capable of receiving electrical energy

and performing safely the functions for which it was built, to-wit: a substation. *See Point 4 of Respondent's Brief.*

Such is not true with respect to the situation in the *Russell* case. In that case the electrical appliances at the office building, and particularly at the metal barn, were never standard or safe but were from the time of their installation always defective, as we have pointed out.

The barn and office building in the *Russell* case were not surrounded by a high wire fence or locked as was the substation in the case at bar, with the only two keys in possession of the officers of the Pacific Fruit Express Company. In the *Russell* case there was no way for anyone operating the stockyards or at the stockyards to make the premises at or around the barn safe on the morning of the accident as there was in the *Johnson* case. In the *Johnson* case all that was necessary to have made the substation safe was to disconnect the switches leading to the lightning arrestors, which was the duty and obligation of the owner and operator of the substation, to-wit: the Pacific Fruit Express Company; its officer was the one who gave Johnson the key and sent him in alone, all without any knowledge whatsoever on the part of the Railroad Company.

Now, let us see what the Idaho Court decided in the *Russell* case. The Court clearly was not dealing with a situation such as existed in the case at bar; it had a factual situation where the electric lines to which energy was being furnished were defective. The Court did not have before it, nor did it discuss, a situation where energy was being delivered to a substation or anything similar, where the equipment or appliances were not defective, or a situation where the appliances and equipment were capable of receiving energy

safely and performing properly; or where, if the appliances were operated properly, as they had been for twenty-five years, no accident would have occurred. The Court was dealing with a situation where the equipment to which energy was being supplied was defective or was negligently installed, which equipment was supplying energy to places that were not enclosed with a high fence and locked. The court was not concerned with a situation where an employee was sent into a place alone which was dangerous *only* because some switches could and should have been pulled which would have made the place entirely safe. Neither was the Court dealing with a situation where the National Electric Code did not apply. *See page 32 of Respondent's Brief.*

• In the *Russell* case the situation at the barn was always dangerous because of defective and negligent wiring, and particularly when a defective transformer belonging to the City forced an excessive amount of energy through the lines and into the buildings. There is nothing of the sort in the case at Bar.

Because of the facts which existed in the *Russell* case but do not exist in the case at bar, the Court's opinion is now understandable. For instance, when the Court discusses Appellants' Requested Instruction No. 15, on page 9, it makes a statement that one furnishing electricity must refuse to do so where it is known, or in the exercise of reasonable care should have been known "that the wiring or appliances of the customer are not safe". (We again submit that the Railroad was not supplying the electricity in the case at bar but that it was being furnished by the Idaho Power Company, see Point 1 of Respondent's Brief.) The Court without a doubt had reference to defects or negligent manner of in-

stallations when it used the words "not safe" because all the authorities cited to support the statement are cases based upon some defect in the lines or equipment. The Court was not referring to a situation where the equipment, as in the case at bar, was neither defective nor negligently installed.

Following the citation of the cases the Court said that the rule just referred to "does not apply and the trial court properly refused so to instruct the jury, because the proof fails to show that the City either had knowledge of the *defects* in the customer's wiring and installations or should have known thereof." (Emphasis ours.) Then the court said:

> "Appellants assign error of the trial court in giving Instruction No. 17 to the effect that a supplier of electricity is not responsible for the condition of a customer's lines unless it has actual knowledge that the lines are *defective;* also that the supplier is not required to inspect the customer's lines at the time of connection or thereafter.
>
> "Such instruction states the rule announced by the weight of authority, and therefore the trial court properly gave it." (Emphasis ours.)

and cites authorities to support that statement. These cases all refer to some defect in appliances or equipment as stated above and affirm the rules set forth in Point 4 of Respondent's Brief.

The Court cites *29 C. J. S.* 611, Sec. 57, which affirms the statement in *134 A. L. R.* 507, also cited, that in the absence of knowledge of *defects* the supplier is not liable for injuries to persons or property of the consumer who owns, controls or maintains such wires or appliances (page 508).

Particularly applicable also to the situation in the case at bar is the statement in 29 C. J. S. Section 57, cited by the Court, which reads as follows:

> "* * * but, where defendant retains or exercises no control, the fact that the apparatus was originally supplied, sold, or installed by defendant imposes no liability, unless the work as originally done was improper or imperfect and the injury resulted from that cause."

In the *Russell* case the work originally done was improper or imperfect. In the case at bar it was properly and perfectly done and continued to be thoroughly safe and adequate to receive power or energy and became unsafe only because of the manner in which the substation was operated by the Pacific Fruit Express Company, the owner and operator thereof.

Illustrating what the Court was referring to in the *Russell* case are two other authorities it cites—*Jelf* vs. *Cottonwood Falls Gas Company* (Kans.) 178 Pac. (2d) 992, and *Koch* vs. *Telluride Power Company* (Utah) 209 Pac. (2d) 241.

In the *Jelf* case there was a gas explosion and judgment for the defendant was affirmed. The defendant had notice of gas leaks and that the supply of gas was escaping into the residence of the plaintiff, and in that case the court said:

> "It was defendant's duty to properly inspect and to properly keep in repair its own pipes, fittings, etc. It was also defendant's duty to properly inspect the customer's pipes, connections, and appliances, after having sufficient notice of a leak or leaks therein."

The condition referred to in that case was dangerous because of defects and not otherwise. Suppose there were no leaks or defects but the owner so operated the appliances in his house as to cause damage, neither he nor another in the house could have held the defendant liable. The latter is not supposition when applied to the case at bar.

In the *Koch* case the hazardous or unsafe condition was a *defective* transformer; judgment for defendant was affirmed and the court said:

> "* * * the negligence in this case was not in permitting the current to charge the wires of the defendant company up to the utility pole but was in closing the circuit so that the current could flow into the defective transformer without taking precautions to protect persons who might have cause to be in close proximity to the transformer."

Likewise, in the case at bar, the energy going into the substation presented nothing more than a condition. The cause of the accident was the manner in which the Pacific Fruit Express Company operated the substation, particularly in failing to disconnect the switches to the lightning arrestors.

The *Russell* case does not change the rule of law laid down by the Idaho Supreme Court set forth in Point 3 on page 22 of Respondent's Brief; neither does it modify in any respect any other Idaho cases.

The Railroad had leased the premises to the Pacific Fruit Express Company and any liability resulting from the operation of the substation would be that of the lessee, Pacific Fruit Express Company.

Thus we submit that the *Russell* case is not controlling in the case at bar with reference to whether the Railroad

was negligent. The *Russell* case is based upon facts entirely different and the authorities the Court cites positively and directly affirm and support the legal propositions set forth by Circuit Judge Chambers in the case at bar on page 431 of the decision in 233 Fed. (2d).

2.

The Russell case supports the Railroad and not the Johnsons.

The *Russell* decision absolutely establishes that under the facts in the case at bar the Railroad was a statutory employer under the Idaho Workmen's Compensation Act for the reasons discussed on pages 37-38 of Respondent's Brief.

In the *Russell* case the Stockyards Company was performing service for the Railroad in taking care of and feeding livestock; and in the *Johnson* case the Pacific Fruit Express Company was furnishing cars, heater and refrigerator service for the Railroad (R. 314, 359-360). The substation where Johnson was injured was used in the performance of that work.

In the *Russell* case, Russell, with an employee named Jorgensen, on the morning Russell was electrocuted, was feeding sheep which had been trucked in by individuals and later delivered to the Commission Company (the sheep had not come in by rail), and "during a lull in their work" went to the office of their employer and a short time thereafter Russell left and was found electrocuted at the northeast corner of the metal barn. The Court said:

> "It thusly appears that the work being performed by Russell and Jorgensen relating to those particular

sheep at the time in question was of intrastate classification covered by the workmen's compensation law.

> "We conclude that respondent Railroad Company was the statutory employer of decedent Russell at the time of his fatal accident, pursuant to the provisions of I. C. sec. 72-1010, a part of the workmen's compensation law. That section provides that 'employer' includes 'the owner or lessee of premises, or other person who is virtually the proprietor or operator of the business there carried on, but who, by reason of there being an independent contractor, or for any other reason, is not the direct employer of the workman there employed.' " (Citing Idaho cases.)

following which the Supreme Court stated that the trial court properly granted the Motion for a Directed Verdict in favor of the Railroad.

The premises on which the Pacific Fruit Express Company performed service for the Railroad were leased by the Railroad to the Express Company; it performed the service for the Railroad, and even though the Express Company be classed as an independent contractor, the statutes, to-wit: Sections 72-811 and 72-1010 of the Idaho Code, set forth in the Appendix of Respondent's Brief, together with the decisions of the Idaho Supreme Court thereunder, including the *Russell* decision, make the Railroad in the case at bar a statutory employer and not subject to a common law action based on negligence.

CONCLUSION

Respondent prays that its Petition for Rehearing be granted, that the Petition for Writ of Certiorari be denied or that the Judgment of the Court of Appeals of the Ninth Circuit be affirmed.

Respectfully submitted,

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Counsel for Respondent.

10 South Main Street,
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Dated:

January 29, 1957.

L. H. ANDERSON,
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Pocatello, Idaho,
Of Counsel.

CERTIFICATE OF COUNSEL

The undersigned, Bryan P. Leverich, Attorney for Respondent, hereby certifies that the Petition for Rehearing filed in this cause is presented in good faith; that in his judgment said Petition is restricted to the grounds specified in paragraph 2 of Rule 58, and that said Petition for Rehearing is not imposed for delay.

BRYAN P. LEVERICH,
Counsel for Respondent.